No. 2956.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error.

Brief of Plaintiff in Error.

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BRIEF OF PLAINTIFF IN ERROR.

Plaintiff in error sued upon an assigned claim to recover moneys paid to defendant under a contract for the purchase and sale of certain real and personal property, and also to recover the value of certain improvements placed by its assignor upon defendant Springe's lands.

The court below granted defendant a nonsuit upon the ground that plaintiff is estopped from pressing its claim because of a judgment in ejectment rendered in a suit to which defendant Springe and plaintiff's assignor were parties (Tr., pp. 178-183).

The real meaning of the said judgment of nonsuit

is that although plaintiff's assignor was once possessed of a lawful and just claim against defendant Springe for approximately $20,000.00 actual cash paid to Springe and for $30,000.00 actually paid out for improvements on Springe's land, these just and valid claims were irretrievably lost, nevertheless, because, as the trial court conceives it, the judgment in ejectment is a conclusive determination against their validity. The purchase price which Springe agreed to take for the land was $47,000.00. The judgment of nonsuit leaves in Springe's hands not only the land but also more than $50,000.00 in cash and improvements. Plaintiff does not accede to the view that the judgment in ejectment is a bar to these claims and has sued out this writ of error.

STATEMENT OF FACTS.

Briefly stated, the facts are as follows: On September 20, 1906, one Shuman entered into a contract with defendant Springe for the purchase and sale of certain real and personal property (Tr., pp. 10-17). The total purchase price for both the realty and the personalty was $55,000.00, and of this sum $8,000.00 was for the personal property, and the balance for the realty (Tr., p. 13). The purchase price of the personal property was paid in full, and that part of the contract relating to the personalty has no further bearing upon the case. Shuman assigned the contract to Brown. Brown entered into possession of the

land pursuant to the contract, and proceeded to erect valuable improvements on the same. All payments to Springe on account of the realty were duly made as called for by the contract, with the exception of the final payment. The payments so made aggregated $18,500.00, and the interest paid to Springe brought up the total payments to approximately $20,000.00 (Tr., pp. 11-13).

The contract contained the following provisions respecting the vendor's title:

> "The seller agrees to furnish an abstract of title covering the lands hereby agreed to be sold complete to date on or before December 15th, 1906. The purchaser is allowed thirty days after receipt of said abstract within which to examine title. Objections to the title, if any, shall be reported to the seller, in writing, within said period of thirty days, and if not so reported shall be deemed to have been waived. The seller agrees to remove defects rendering the title unmerchantable and specified by the purchaser in his written report of objections; but if said defects (saving and excepting the securing of said patent) are not removed within a reasonable time, not to exceed ninety days after the receipt by the seller of said written report, the purchaser may at his option insist upon the specific performance of the seller's agreement to sell, extend the time for the removal of said defects, or declare this agreement at an end, in which latter event the seller agrees to return to him the sum of money herein receipted for and any further sums paid on account of said purchase price.
>
> * * *
>
> "The delivery to the purchaser of a good and sufficient deed of grant, bargain and sale covering title to said above described parcels of land and payment of said last installment of twenty-eight thousand five hundred ($28,500) dollars of the purchase price are concurrent conditions" (Tr., pp. 12 and 13).

A written report, presenting some twenty objections to the title, was made on December 6, 1906 (Tr., p. 116).

Defendant not having cleared up the defects within ninety days, Brown, under date of March 18, 1907, insisted upon the specific performance of the contract and extended Springe's time to remedy the defects until September 1, 1907 (Tr., p. 126).

Defendant Springe thereupon under date of April 16, 1907, agreed to clear up these objections (Ex. 5, Tr., p. 128).

The final payment fell due by the terms of the contract, on September 15, 1907. In June, July, August and September, 1907, Springe was still engaged in clearing up the vendee's objections (Tr., pp. 130-131-140, incl.). On September 3, 1907, two days later than the agreed extension, Brown through his counsel reiterated the necessity for remedying certain of the defects pointed out in the report of December 6, 1906, and added:

> "Until this is done, we do not believe that there is sufficient record evidence of Mr. Springe's title" (Plaintiff's Ex. 11, Tr. 139-140).

While matters were in this condition, and three days before the date fixed by the contract for the final payment, Brown, on September 12, 1907, at the request of Springe, waived in writing the production and tender of a deed by Springe, which tender

Springe, by the terms of the contract, was obligated to make on September 15, 1907 (Tr., pp. 141-13).

This waiver by Brown was accepted by Springe upon the express understanding that Springe would with all diligence cause to be delivered to Brown upon payment of the balance of the purchase price a "due and proper deed conveying the property" to Brown (Tr., pp. 141-142).

The phraseology of this waiver, like the contract itself, called not simply for a deed, but for a merchantable record title, and was not a waiver of objections to Springe's title.

Haynes v. *White,* 55 Cal., 38, 40;
Easton v. *Montgomery,* 90 Cal., 307, 314;
Winkler v. *Jerrue,* 20 Cal. App., 555, 559;
Agnew v. *Nelson,* 27 Cal. App., 39, 41, 42.

The waiver and agreement of September 12, 1907, set at large the time for the final payment under the contract. Time, in other words, was no longer of the essence of the contract.

Nothing further in the way of clearing the title was done by Springe. He gave Brown no notice that time would again be made of the essence of the contract or that he would tender a deed on a day certain and demand payment on that day. He simply offered Brown a deed without clearing the title, and without any previous notice or demand upon Brown, and then demanded possession and brought ejectment and re-

covered a judgment giving him the possession of the property (Tr., p. 150 and 97-99).

Springe has his land. He also has approximately $20,000.00 in principal and interest which Brown paid to him and he has also the benefit of the improvements which were placed on his land by Brown at a cash outlay of $30,000.00.

Plaintiff has succeeded by assignment to Brown's claim for the recovery of the moneys thus paid to Springe, and paid out for the improvements of said land, and has brought this suit.

I.

THE RIGHTS OF THE PARTIES AS ESTABLISHED BY THE FOREGOING FACTS, CONSIDERED APART FROM THE QUESTION OF RES ADJUDICATA.

By the agreement and waiver of September 12, 1907 (Tr., pp. 141-143), the legal rights of the parties from and after September 15 were as follows:

Springe's Rights and Duties:

Springe, if he wished to stand upon the contract and obtain a forfeiture of Brown's previous payments and outlays ~~and~~ if Brown should fail to make the final payment, was bound to do three things, viz:

(1) He was bound first to perfect his title so that he could comply with his contract; for the tender of a merchantable record title was a condition to be performed concurrently with the final payment;

(2) After perfecting his title he was bound to give to Brown reasonable and explicit notice of his intention to tender a deed on a designated day, and that he would claim a forfeiture if payment was not made at that time (see cases quoted *infra*); and

(3) He was bound to make a tender of a deed in accordance with such notice.

In this way—and only in this way—could Springe, if Brown failed to pay, become lawfully entitled to retain the money therefore paid to him by Brown, together with the benefit of Brown's expenditures.

The foregoing propositions of law are perfectly well settled as we shall now see:

The provisions of the contract which called for the delivery of a deed conveying a good title and for the final payment were concurrent conditions (Tr., pp. 13-14).

Such being the case it is of course clear that Springe could not put Brown in default unless able to furnish a good title (Civil Code of California, §1439).

But as already said it would not have been enough if Springe had merely cleared his title and tendered a deed. He was bound to go further and give due and proper notice to Brown of his intention to tender the deed and demand the final payment upon a day certain, and he should also have notified Brown that if payment were not made at the designated time a forfeiture would be exacted.

These phases of the law are illustrated by the following quotations from *Boone* v. *Templeman,* 158 Cal., 290. (All italics ours.)

"The general rule on the subject is thus stated by Mr. Pomeroy: 'A condition that the title shall be made, or the price shall be paid, on or before a day named, may be waived by the party entitled to performance; and if such party thus waives the exact performance at the day, or if he goes on treating the agreement as still binding after default has been made, he cannot afterwards turn around and set up the delay or default as creating a forfeiture, and therefore, a defense.' (Pomeroy on Contracts, §337)" (Ibid., pp. 294-295).

"Where time was originally essential, but for sufficient cause a forfeiture for default therein has been waived, time ceases to be essential and becomes only material thereafter until the vendor again makes it essential by a proper notice and demand" (Ibid., p. 299).

"Having, by his conduct, waived the right of forfeiture for non-payment of the installments at the precise date of maturity, **he could not, after the whole became due, revive or renew it without previous notice accompanied by a tender of a deed**" (Ibid., p. 298).

" 'While not necessarily an absolute permanent waiver, yet in a court of equity there was at least such a temporary suspension of the right (of forfeiture) as could only be restored **by his giving a definite and specific notice of an intention to that effect**' " (Ibid., p. 297).

" 'Nor will his right to the relief be cut off until the vendor **places a limit to the lapse of time by a demand of payment at or before a specified day, and a notice that the agreement will be rescinded unless the demand is complied with, and the vendee's default thereon**' (Pomeroy on Contracts, §404)" (Ibid., p. 299).

Cases from other States are in accord with this proposition as the following citations and quotations will show.

The notice must be "definite and specific."

Monson v. *Bragdon,* 159 Ill., 66;
Eaton v. *Schneider,* 57 N. E., 421;
Watson v. *White,* 38 N. E., 902.

The notice must be to the effect,

"that unless the other party performs his part of the agreement within a time designated (which must be a reasonable time), he will be deemed to have forfeited his rights thereunder."

Fargusson v. *Talcott,* 73 N. W., 207.

"* * * The rights of the vendee under the contract in the present case could not be put at an end immediately by tender to him **unless notice had been previously given to him that strict performance would be required on that day.**"

Lawrence v. *Miller,* 86 N. Y. Rep., 134, and cases cited.

If payment on a designated day is waived,

"and if the vendor desires . . . payments due and unpaid to be paid, he must . . . notify the purchaser . . . that the money due and unpaid must be paid by a date designated, and **if the purchaser fails to pay as required, the vendor may forfeit the contract and maintain ejectment for the possession of the land.**"

McCarty v. *Myers,* 5 Hun., 83-85.

The following additional California cases also recognize the rule:

Myers v. *Williams,* 173 Cal., 301, 304;
Stevinson v. *Joy,* 164 Cal., 279.

Springe, as we have seen, neither cleared his title nor gave to Brown any notice that he intended to tender a deed on a designated day or that he would demand a forfeiture if payment was not forthcoming on that day. As in *Lawrence* v. *Miller, supra,* he merely tendered a deed and such mere tender would not put an end to the contract.

Brown's Rights and Duties:

Brown's rights upon the facts as above stated are equally clear. He could not be compelled to take the property while the title was defective, nor could his payments be forfeited or his outlays for improvements be lost unless he should default in the final payment after Springe had cleared the title and tendered a deed to him upon due and reasonable notice. The authorities above quoted sufficiently illustrate this.

But while it is true that Springe could not forfeit Brown's payments and outlays without tendering a clear title and giving due notice, it is nevertheless equally true that Brown could not lawfully retain possession of the premises and at the same time fail or refuse to pay upon the ground that the title was defective. Under such circumstances Springe had the right to tender him a deed sufficient in form to convey to him such title as Springe had, and thereupon it became the duty of Brown either to get out or else accept the deed and make the final payment and waive all objections to the title.

Thus it is said in *Gervaise* v. *Brookins,* 156 Cal., 103-106-107:

> "It appears to be well established that, under such circumstances, the vendee cannot retain possession of the land, while neglecting to pay the price when due, and that the failure of the title does not give him the right to continue in possession by merely keeping good an offer to perform on his part conditioned upon performance by the vendor. The reasons for this rule are thus stated by the Supreme Court of the United States in *Burnett* v. *Caldwell,* 9 Wall. (U. S.), 293: 'If the contract stipulates for possession by the vendee, or the vendor puts him into possession, he holds as a licensee. . . . The case comes within the category of a license. In such cases, the vendee cannot dispute the title of the vendor any more than the lessee can question the title of his lessor. The assignee of the vendee is as much bound by the estoppel as the vendee himself. Upon default in the payment of any installment of the purchase money, the possession becomes tortious and the vendor may at once bring ejectment.'"

Speaking further of the decision of the United States Supreme Court in said case of *Burnett* v. *Caldwell,* the opinion in *Gervaise* v. *Brookins* goes on to say:

> "In that case the court further held that **the fact of want of title in the vendor, and the fact that the vendee had paid a large part of the price were alike immaterial as defenses to an action of ejectment by the vendor"** (Ibid., p. 107).

Many California cases to this same effect are cited in the course of the opinion in *Gervaise* v. *Brookins, supra.*

It is thus entirely clear that Springe had a right to recover in the action of ejectment, notwithstanding

the fact that his title was defective and notwithstanding the further fact that Brown had made large outlays upon the property and had paid some $20,000.00 on the purchase price. Judgment in the ejectment suit was therefore properly rendered notwithstanding the fact that Springe was not in a position to perform his contract, because of his defective title, and notwithstanding the fact that he had given no notice of any intention to tender a deed upon a day certain and that he would exact a forfeiture if final payment were not then made.

But the important thing is that after surrendering up the possession, whether voluntarily or as a result of the ejectment suit, Brown had the right to recover back his cash payments and his outlays upon the property.

Haile v. *Smith,* 128 Cal., 415, 418, 419;
Heilig v. *Parlin,* 134 Cal., 99, 100.

Having thus concluded that Brown, the assignor, was entitled to recover these payments and outlays from the defendant in error, the only question which remains is that decided adversely to our contentions by the lower court, viz: Did the judgment in ejectment against Brown operate to estop him and his assignee from now claiming these moneys.

II.

THE JUDGMENT IN EJECTMENT IS NOT A BAR.

The judgment in ejectment merely directs that plaintiff "have and recover of and from the defend-" ant, J. Dalzell Brown, . . . the possession of " the real property hereinabove described, and of the " whole thereof, together with said plaintiff's costs " and disbursements . . ." (Tr., p. 99).

We submit that it is not possible that such a judgment can operate as a bar to the claim of plaintiff:

> "§1911. **What deemed adjudged in a judgment.** That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

Code of Civil Procedure of California, §1911.

See also *Code of Civil Procedure of California,* §1908.

The case of *Haile* v. *Smith,* 128 Cal., 415, affords a strong analogy to the case at bar. It was an action of ejectment. The vendee pleaded want of title in the vendor. The defendant had made all payments save the last and had improved the property. The vendor had tendered a deed, but the vendee had refused to accept it on the ground that the title was bad. The court held the vendor entitled to possession, saying:

> "If appellant desired to retain the possession which he

acquired under the contract he should have complied with his part of it; if he concluded not to comply because the title was not satisfactory to him, he was bound to restore possession to respondent. **Whatever cause of action he may have for the purchase money which he paid and for the value of his improvements is another matter; it constitutes no defense to the present action.**"

Haile v. *Smith,* 128 Cal., 415, 419.

In *Burnett* v. *Caldwell,* 9 Wall. (U. S.), 293, the Supreme Court of the United States held, as we have already seen:

"That the fact of want of title in the vendor, and the fact that the vendee had paid a large part of the price, were alike immaterial as defenses to an action of ejectment by the vendor."

Gervaise v. *Brookins,* 156 Cal., 103-107.

It thus appears that it would have availed Brown nothing in the action of ejectment if he had elaborately set forth the want of title in his vendor. Being in possession he was precluded from raising the question. He was bound either to take such title as the vendor had or to get out. Precluded as he thus was from raising the issue as to title, it is to us incomprehensible how it could be thought that the question of Brown's right to recover back what he has paid is *res adjudicata.* What sense or justice would there be in such a rule?

The language of *Haile* v. *Smith* (*supra*) is directly to the contrary, and the court in holding that

the fact that payments have been made on the purchase price and for improvements is no defense in the matter, is very particular to say that:

> "Whatever cause of action he may have for the purchase money which he paid and for the value of his improvements is another matter."

Haile v. *Smith,* 128 Cal., 415, 419.

Heilig v. *Parlin,* 134 Cal., 99, is also strongly in point. There the suit by the vendor against the vendee instead of being in ejectment was brought to quiet title. The vendee filed a cross-complaint in which he demanded the return of the purchase money and the money expended for improvement. A general demurrer to the answer and to the cross-complaint was sustained. Defendant declining to amend, his default was taken and judgment was entered quieting the vendor's title. Thereafter the vendee brought suit to recover "back the money paid " out on account of the purchase price, and for improve- " ments on the land," and it was claimed that the judgment quieting title was *res adjudicata* as to the moneys paid, and justified their retention by the vendor. The Supreme Court held that the judgment quieting title and refusing to entertain the vendee's cross-complaint was not a bar. We beg to refer the court to the entire case as strongly analogous.

Certainly a judgment in ejectment stands upon no higher plane than a judgment quieting title; and if

there was a right in the vendee to recover the moneys paid the vendor in the case of *Heilig* v. *Parlin* notwithstanding the judgment quieting title and dismissing the cross-complaint, we submit that it is not possible that such a right does not attach in the present case.

It is no answer to say that Brown forfeited his payments by failing to formally rescind the contract; nor is it any answer to say that such forfeiture was accomplished by the fact that Brown resisted ejectment for a time.

There is no doubt but that upon the failure of defendant's title, Brown could have rescinded the contract and sued to recover his payments (*Gates* v. *McLean,* 70 Cal., 42-50).

True, Brown did not on demand surrender the possession, but did so only at the end of the ejectment suit; but he did not move for a new trial, and he did not appeal, and it would be strange indeed if the law would impose a forfeiture of a vendee's payments in order to punish him for having entertained the mistaken notion for a time, that he had a defense to the action of ejectment.

As already stated, Brown after the judgment in ejectment took no appeal therefrom; nor did he move for a new trial therein (Tr., p. 150); nor was his eviction effected by a writ of execution. Judgment was entered in the ejectment suit on the 26th day of May, 1908. On the 2nd day of June, 1908, Brown

quitted and surrendered up the possession to Springe (Tr., p. 151).

All that the law requires as a condition precedent to the recovering back of moneys paid on the contract or expended for improvements is either a surrender of the possession or proof of eviction. Thus it is said in *Rhorer* v. *Bila,* 83 Cal., 51-55:

> "The law requires him to surrender the possession of the property, **or prove an eviction therefrom,** before permitting the defense of a failure of consideration, or a suit to recover the purchase price, or damages."

Moreover, the voluntary surrender of the premises after judgment was entered, without taking an appeal or moving for a new trial (Tr., p. 173), operated as a consent to the rescission of the contract. Thus in *Hicks* v. *Lovell,* 64 Cal., 14, the vendee repudiated the contract and at the same time continued to hold possession of the land. The court held that the vendor was neither bound to stand upon the contract and compel performance nor to recover damages for the purchase price, but that he had the right to bring ejectment to recover back his land, **and that the preliminary notice to surrender possession followed by the ejectment suit** gave the assent of the vendor to the repudiation by the vendee of the contract and put it at an end; the court saying:

> "In so doing and giving the preliminary notice to surrender possession, he, too, gave his assent to the abandonment of the contract; and the parties who made it having thus by mutual assent rescinded it, its validity was gone and it ceased to exist."

Hicks v. *Lovell,* 64 Cal., 14-21.

So in the case at bar, Springe, although he failed to clear up his title and to comply with the contract, had the right by reason of the fact that Brown was in possession, to declare the contract at an end and to recover the possession, notwithstanding the fact that his title was defective. Springe's demand for surrender of the possession, his suit in ejectment and the subsequent surrender of the premises by Brown without motion for a new trial or appeal operated as an assent to the termination of the contract, and accomplished in effect an abandonment and rescission of the contract by mutual consent, and brings the case within the category of those cited in *Heilig* v. *Parlin (supra),* wherein it is said:

> "In such case the vendee is clearly entitled to recover what he paid under and in pursuance of the contract so rescinded. (*Bohall* v. *Diller,* 41 Cal., 533; *Shively* v. *Semi-Tropic L. & W. Co.,* 99 Cal., 259; *Merrill* v. *Merrill,* 103 Cal., 287; *Glock* v. *Howard and Wilson Colony Co.,* 123 Cal., 15.)"

Heilig v. *Parlin,* 134 Cal., 99-102.

> "The conduct of the parties, both being in default, the one demanding and the other surrendering the possession of the premises, amounted to a rescission of the contract."

Prentice v. *Erskine,* 164 Cal., 446, 450.

Far from forfeiting Brown's right to recover his money payments, and instead of operating as an

estoppel to set up those rights the judgment in ejectment operated in reality, as the foregoing authorities clearly show, to fix and confirm Brown's right to recover these moneys. The judgment in ejectment went no further than to restore the possession to Springe. The Supreme Court of California has recently said:

> "It is the judgment, and not the preliminary determination of the court or jury, which creates the estoppel. Only that which is the matter directly adjudged, or which appears upon the face of the judgment to have been so adjudged, is conclusive between the parties. (Code Civ. Proc., secs. 1908, 1911.)"

Bank of Visalia v. *Smith,* 146 Cal., 398, 402.

This is in accordance not only with the Code of Civil Procedure, but in accordance with the general doctrine concerning *res adjudicata.* This suit is not upon the same cause of action involved in the ejectment suit, and the judgment is therefore not an estoppel. See particularly *Langdon* v. *Clark,* 221 Fed., 841; *Cromwell* v. *County of Sac.,* 94 U. S., 351.

For the foregoing reasons we respectfully submit that the judgment of nonsuit was erroneous and that the same should be reversed.

Respectfully submitted.

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